

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
CENTRAL VALLEY REGION

In the matter of Administrative Civil Liability  
Complaint No. R5-2017-0504 (Sweeney  
Dairy)

Prosecution Team Rebuttal Argument and  
Rebuttal Evidence

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**PROSECUTION TEAM REBUTTAL ARGUMENT AND REBUTTAL EVIDENCE;  
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R5-2017-0504**

TO ALL PARTIES HEREIN;

PLEASE TAKE NOTICE that the Prosecution Team for the California Regional Water Quality Control Board, Central Valley Region ("Prosecution Team") hereby submits a response to the 28 February 2017 *Submission of Evidence and Policy Statements Regarding Hearing on Administrative Civil Liability Complaint R5-2017-0504* submitted by Mr. Raymond L. Carlson on behalf of Mr. James Sweeney and Ms. Amelia Sweeney (collectively referred to as "Discharger").

The Prosecution Team continues to recommend a discretionary penalty in the amount of \$75,600 for the Discharger's failure to file a 2015 Annual Report. The Discharger's argument that the Prosecution Team has not complied with the Hearing Procedures by failing to submit a Legal and Technical Arguments or Analysis, and Policy Statement is not supported. Additionally, the Discharger's argument that the Prosecution Team attempted to shift the burden of proof in violation of the Discharger's presumption of innocence is without merit. The Discharger's objection to the Prosecution Team's Exhibits 12, 14, and 16 is without merit and should be rejected. The Discharger's argument that Order No. R5-2013-0122, the Reissued Waste Discharge Requirements General Order for Existing Milk Cow Dairies ("Reissued General Order"), is unenforceable because the Sacramento Superior Court ordered the Central

Valley Regional Water Quality Control Board ("Central Valley Water Board") to set it aside, is without merit. Furthermore, the Discharger's arguments challenging the Reissued General Order at this juncture in the enforcement proceeding are improper, untimely, and should not be considered at the 6/7 April 2017 hearing. The Discharger's argument that the Complaint is a denial of due process and a violation of its civil rights is without merit and should be rejected. Lastly, the Discharger's argument that the Prosecution and the Advisory Teams have a conflict of interest is meritless and should be rejected.<sup>1</sup>

**I. The Prosecution Team Complied with the Hearing Procedures in Submitting Evidence, Legal and Technical Arguments or Analysis, and Policy Statements**

The Discharger argues that the Prosecution Team did not comply with the Hearing Procedures included with Administrative Civil Liability Complaint (ALCL) R5-2017-0504 because the Prosecution Team did not submit "Legal and Technical Arguments or Analysis, and Policy Statements." The Hearing Procedures require the Prosecution Team to submit the following in advance of the hearing: (1) All evidence the Prosecution Team would like the Board to consider; (2) All legal and technical arguments or analysis; (3) The name of each witness the Prosecution Team intends to call at the hearing, the subjects that will be covered by each witness and the estimated time required for each witness; and (4) The qualifications of each expert witness, if any. (*Hearing Procedures*, p. 3.) A policy statement is not required, but if submitted, must be

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<sup>1</sup> In its 28 February 2017 *Submission of Evidence and Policy Statements Regarding Hearing on Administrative Civil Liability Complaint R5-2017-0504*, the Discharger also makes some factual misstatements. Specifically, that there are around 260 milking cows at Sweeney Dairy, that Sweeney Dairy is about one-half mile south of the Kaweah River, and that the Discharger has never had a water sample from wells on its property that exceed water quality requirements for nitrate or other constituents. The Prosecution Team notes Exhibit 16, 12 August 2016 Inspection Report and Notice of Violation, previously submitted by the Prosecution Team, includes a statement by Mr. Sweeney that the dairy currently houses approximately 280 milking cows and an addition 35 to 40 dry cows. The Prosecution Team provides Exhibit 17, a map showing the Sweeney Dairy and application area, and Exhibit 18, groundwater sample analysis dated June 19, 2009 submitted by the Discharger to the Central Valley Water Board, to rebut these misstatements and to clarify that the application area for the Sweeney Dairy abuts the Kaweah River, not the dairy itself, and that the 2009 groundwater sample analysis provided by the Discharger show an exceedance of nitrate.

submitted with all materials required under section IV of the Hearing Procedures. (*Hearing Procedures*, p. 6.) The Hearing Procedures do not require that an additional or separate document be submitted outlining the legal and technical arguments or analysis. The Prosecution Team complied with these procedures through the factual allegations and legal arguments and analysis made within the body of ACLC R5-2017-0504 and in the Prosecution Team's Evidence Submittal for ACLC R5-2017-0504 on 7 February 2017. Therefore, the Prosecution Team complied with the Hearing Procedures.

**II. The Prosecution Team did not Attempt to Shift the Burden of Proof to the Discharger or Violate the Discharger's Presumption of Innocence**

The Discharger argues that the Prosecution Team attempts to shift the burden of proof to the Discharger by failing to cite or produce evidence of a discharge of waste or any other act by the Discharger that violates the Porter-Cologne Act. Additionally, the Discharger argues that this shifting of the burden of proof deprives the Sweeneys' of the presumption of innocence.

As the party alleging a violation of the Water Code, the burden is on the Prosecution Team to prove the allegations made against the Discharger. (Evid. Code, § 520.) The Prosecution Team does not dispute that it has the burden of proof in this proceeding. An action by the Regional Board must be supported by substantial evidence. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.) The California Supreme Court defined substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (*Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393.)

The Prosecution Team alleges that the Discharger violated Water Code section 13267, subdivision (b), by failing to furnish monitoring program reports in accordance with the Reissued

Waste Discharge Requirements General Order for Existing Milk Cow Dairies (Order R5-2013-0122) (Reissued General Order). The Reissued General Order was adopted pursuant to the Central Valley Water Board's authority under Water Code section 13267, subdivision (b), and provides the written explanation regarding the need for the reports and evidence supporting the requirements of these reports. For a violation of Water Code section 13267, subdivision (b), under the Reissued General Order the Prosecution Team has the burden of proof to demonstrate: (1) the applicability of the Reissued General Order to the Discharger; and (2) the failure to submit the required annual report under the Reissued General Order.

There is no dispute that the Discharger owns an existing dairy. As stated in the Reissued General Order, the Order "serves as a general waste discharge requirements for discharges of waste from existing milk cow dairies...of all sizes." (*Reissued General Order*, p. 1.) As the Discharger notes, their dairy has been "continuously operating on the site for over eighty years." (28 February 2017 *Submission of Evidence and Policy Statements*, p. 18.) As a dairy in existence at the time of the Order's adoption in 2013, the Discharger's dairy is regulated by the Reissued General Order. Further, the Central Valley Water Board has previously found that the Discharger is regulated by the Reissued General Order. (See *Prosecution Team Exhibits 4, 5, and 6*, ACLO R5-2014-0119, ACLO R5-2015-0065, and ACLO R5-2016-0063.)

There is no dispute that the Discharger failed to submit the 2015 annual report, as required by the Reissued General Order. The Prosecution Team submitted evidence of a Notice of Violation sent to the Discharger for failing to submit the 2015 annual report. (*Prosecution Team Exhibit 8*.) Additionally, a pre-ACLC letter was submitted as Prosecution Team Exhibit 9, demonstrating the Discharger's continuing failure to submit the 2015 annual report. Despite the Discharger's claim to the contrary, the Prosecution Team submitted evidence in support of its allegations regarding the Discharger's violation of Water Code section 13267, subdivision (b). The Discharger's

argument that the Prosecution Team's attempt to shift the burden of proof to the Discharger violated the Sweeneys' presumption of innocence is without merit.

**III. The Prosecution Team's Exhibit 12 Compliance by Dairy Size for Submission of 2015 Annual Report, Exhibit 14 Economic Benefit Analysis Prepared by Bryan Elder on 23 December 2016, and Exhibit 16 12 August 2016 Inspection Report and Notice of Violation Should be Admitted and the Discharger's Objection Overruled**

The Discharger objects to the Prosecution Team's Exhibit 12 "Compliance by Dairy Size for Submission of 2015 Annual Reports" and Exhibit 14 "Economic Benefit Analysis Prepared by Bryan Elder on 23 December 2016," claiming the exhibits lack foundation and relevance. Additionally, the Discharger objects to the Prosecution Team's Exhibit 16 "12 August 2016 Inspection Report and Notice of Violation" also claiming the exhibit lacks relevance. The evidence does not lack foundation and is relevant to the proceeding. Exhibit 12 notes that the information regarding dairies covered under the Reissued General Order was compiled from data in the California Integrated Water Quality System (CIWQS). The data covers each dairy regulated under the Reissued General Order and was too voluminous to submit, so it was summarized in a chart. The annual reports were also included as Prosecution Team Exhibit 15 and are all public documents. Dale Essary, who compiled the data and created the chart, will be available to testify at the hearing to provide additional information regarding the data contained in the chart. Further, Exhibit 12 is relevant because it demonstrates the overall compliance with the Reissued General Order in the Central Valley and provides evidence for the Prosecution Team's penalty calculation under the State Water Resources Control Board's *Water Quality Enforcement Policy* (Effective May 20, 2010) ("*Enforcement Policy*"), specifically the culpability and cleanup and cooperation factors.

Prosecution Team Exhibit 14 is the Economic Benefit Analysis for the Sweeney Dairy's failure to submit the 2015 Annual Report. Included on the Prosecution Team's witness list is Bryan Elder, a State Water Board Financial Expert, and Lorin Sutton, an engineering geologist that works in

the Central Valley Water Board's Fresno Office in the Dairy Unit. Both are identified by the Prosecution Team as available to testify regarding the economic benefit and how it was calculated. Exhibit 14 is relevant because the *Enforcement Policy* specifically requires that a discharger's economic benefit be estimated for each violation under Step 8. As explained in Attachment A of ACLC R5-2017-0504, the economic benefit was estimated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN) penalty and financial modeling program. Exhibit 14 is the result of applying the BEN to estimated costs specific to Sweeney Dairy and the submission of the 2015 Annual Report.

Lastly, the Prosecution Team's Exhibit 16 is relevant because it is a recent inspection of Sweeney Dairy by Central Valley Water Board staff and provides evidence of the continuing operation of a dairy by the Discharger, as well as the current conditions at the dairy and compliance with other elements of the Reissued General Order. Because the exhibits do not lack foundation and are relevant to these proceedings, the Discharger's objection should be overruled and the exhibits admitted into evidence.

**IV. The AGUA Decision and the Sacramento County Superior Court's Stay of Proceedings Does Not Affect the Ability of the Central Valley Water Board to Enforce Annual Report Violations under the Reissued General Order**

The Discharger argues that the Reissued General Order was invalidated by the Sacramento County Superior Court's (Superior Court) writ of mandate and stay of proceedings following the decision in *Asociación de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (hereafter *AGUA*) (2012) 210 Cal.App.4th 1255) and is, therefore, unenforceable. The Superior Court's 17 April 2013 writ of mandate ordered the Central Valley Water Board to set aside Order R5-2007-0035 (Waste Discharge Requirements General Order for Existing Milk Cow Dairies) (2007 General Order) and reissue the permit only after application of, and compliance with, the *State Anti-Degradation Policy*. In response, the Central Valley Water

Board adopted the Reissued General Order on 3 October 2013 and rescinded the 2007 General Order. The Central Valley Water Board filed a Return to Writ of Mandate on 11 October 2013. On 5 November 2014 a coalition of community residents and non-profit organizations ("Petitioners") challenged the Reissued General Order's compliance with the *State Anti-Degradation Policy* to the State Water Resources Control Board (State Board). The Superior Court stayed proceedings to determine the adequacy of the Central Valley Water Board's 11 October 2013 Return to Writ until the State Board rules on the petition challenging the Reissued General Order on 6 November 2014. The Discharger argues this writ of mandate and stay of proceedings bar the Central Valley Water Board from seeking administrative civil liability for the Discharger's failure to file the 2015 Annual Report. In asserting this argument, the Discharger mistakenly treats the writ of mandate and stay of proceedings as if they had the force of abolishing the Reissued General Order.

The Superior Court, in issuing the writ of mandate, ordered the Central Valley Water Board to set aside the 2007 General Order and reissue the permit in accordance with the Appellate Court's determinations regarding the *State Anti-Degradation Policy*. The Central Valley Water Board set aside the 2007 General Order, pursuant to the Superior Court's writ of mandate, when it adopted the Reissued General Order in October 2013. The *AGUA* decision and the subsequent writ of mandate do not bar the Central Valley Water Board's enforcement of the violation underlying this proceeding.

In *AGUA*, the Appellate Court held that "the record indicates the monitoring requirements of the Order are inadequate to detect groundwater degradation . . ." and that "the Order does not provide a sufficient enforcement mechanism to ensure that any groundwater contamination is stopped." (*AGUA*, 210 Cal.App.4th at 1260-78.) From this, the Discharger attempts to extrapolate that an Annual Report submission is no longer required because "many of the

elements to be reported in the Annual Report were based upon a monitoring plan in the 2007 Order that the Appellate Court determined was flawed and unlawful.” (28 February 2017 *Submission of Evidence and Policy Statements*, p. 16.) The Appellate Court held that the monitoring plan<sup>2</sup> was insufficient to prevent groundwater degradation. (*AGUA*, 210 Cal.App.4th at 1278.) The Discharger fails to recognize that the effect of the *AGUA* decision was to enhance, not diminish or eviscerate, the requirements imposed under the 2007 General Order.

The Discharger erroneously draws the conclusion that the Superior Court's November 2014 Order to Stay Proceedings resulted in a nullification of the Reissued General Order. (28 February 2017 *Submission of Evidence and Policy Statement*, p. 25 fn. 14.) The Order to Stay Proceedings temporarily suspends the Superior Court's determinations regarding the Central Valley Water Board's Return to the Writ of Mandate. It does not repeal the Central Valley Water Board's adoption of the Reissued General Order, nor does it constrict the ability to the Central Valley Water Board to pursue enforcement under that Order.

**V. The Central Valley Water Board Already Made a Factual Determination About Many Issues Raised by the Discharger in its Evidence Submission.**

As previously noted, the Central Valley Water Board has already determined that the Discharger is subject to the Annual Report requirements and has previously voted to adopt administrative civil liability against it for a failure to file the 2009 Annual Report and a Waste Management Plan (ACLO R5-2011-0068), failure to file the 2010 Annual Report (ACLO R5-2012-0070), failure to file the 2011 Annual Report and a groundwater monitoring well installation and sampling plan (ACLO R5-2013-0091), failure to file the 2012 Annual Report (ACLO R5-2014-0119), failure to file the 2013 Annual Report (ACLO R5-2015-0065), and failure to file the 2014 Annual Report

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<sup>2</sup> The Appellate Court, in *AGUA*, discusses only the MRP that was originally issued with the Dairy General Order in 2007. (See *AGUA*, 210 Cal.App.4th at fn. 14.) A revised MRP was issued by the Central Valley Water Board on 23 February 2011 and is the MRP under which the Discharger was required to submit the subject 2012 Annual Report.



(ACLO R5-2016-0063). In its 28 February 2017 evidence submission for the present matter, the Discharger raises many of the exact same issues previously raised in its briefs and evidence submissions for ACLC R5-2011-0562, ACLC R5-2012-0542, ACLC R5-2013-0539, ACLC R5-2014-0543, ACLC R5-2015-0506, and ACLC R5-2016-0531. In 2011, these issues were considered and addressed in adjudicative proceedings by the Central Valley Water Board. The Board found the Discharger's arguments to be unpersuasive, and imposed administrative civil liability based on the Discharger's failure to comply with the reporting requirements of the 2007 General Order. Likewise, in 2012, in 2013, in 2014, in 2015, and again in 2016, the same issues were considered and addressed in adjudicative proceedings before the Board, which concluded in the same result.

Many of the Discharger's arguments in its 28 February 2017 evidence submission are duplicative to arguments raised during the adjudicative proceedings for ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, ACLO R5-2014-0119, ACLO R5-2015-0065, and ACLO R5-2016-0063. As such, they should be barred for reconsideration by collateral estoppel. (*People v. Sims* (1982) 32 Cal.3d 468, 489.) Collateral estoppel bars the relitigation of issues of fact or law that have already been necessarily determined as part of an earlier case. It promotes judicial economy, preservation of the integrity of the judicial system by avoiding inconsistent judgments, and protection of litigants from harassment by repeated litigation. (*Lucido v. Superior Court*, *supra*, 51 Cal.3d at pp. 342-343.)

Collateral estoppel extends to agency determinations of legal issues. (*Guild Wineries and Distilleries v. Whitehall Co., LTD* (9th Cir. 1988) 853 F.2d 755, 758-759, citing *United States v. Utah Construction Company* (1966) 384 U.S. 394.) Collateral estoppel applies in claims brought in future administrative proceedings if the agency met the prerequisite requirements when arriving at its decision in the first instance: (1) the issue decided in a prior proceeding is

identical to the issue sought to be relitigated, (2) the issue was actually litigated in the prior proceeding, (3) the issue was necessarily decided in the prior proceeding, (4) the prior proceeding resulted in a final judgment on the merits, and (5) the party against whom collateral estoppel is asserted is the same as, or in privity with, a party to the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) In addition, in evaluating whether to apply collateral estoppel, an agency must consider the public policies underlying the doctrine. (*Id.* at 342-343.)

The Discharger should be barred from relitigating the issues that have been previously resolved by this Board. All of the prerequisites to the application of collateral have been satisfied. First, the Discharger's current evidentiary submission essentially repeats verbatim the same contentions and arguments that were made in evidence submissions for the previous enforcement actions. Second and third, the Discharger seeks to relitigate issues that were properly raised during the administrative proceedings for ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, ACLO R5-2014-0119, ACLO R5-2015-0065, and ACLO R5-2016-0063 ("previous proceedings"), and that were decided by the Central Valley Water Board. Fourth, the previous proceedings resulted in final judgments on the merits, which were memorialized in administrative civil liability orders. Fifth, the Discharger is the same party involved in both the present matter and in the previous proceedings. Finally, public policy supports the application of the collateral estoppel doctrine here to preclude the Discharger from raising the same issues in successive petitions. The application will promote judicial economy and protect the Central Valley Water Board from being harassed by repeated adjudication.

#### **VI. The Discharger's Attempts to Challenge the Propriety of the 2007 General Order and the Reissued General Order are Improper During this Enforcement Proceeding**

In its 28 February 2017 submission, the Discharger argues that the 2007 General Order and the Reissued General Order are invalid for a number of reasons detailed in Section E.2 of its

evidence submission. Even if some of the evidence submitted by the Discharger supporting the attack is new to this proceeding, the underlying basis for the challenge remains the same. The Discharger's arguments are duplicative of those raised in the prior proceedings and should be barred by collateral estoppel.

The Discharger is attempting to challenge the validity of the Reissued General Order in an enforcement proceeding. This is a collateral attack on the Order itself (*Transcript from 14 July 2011 Panel Hearing*, p. 24). The Central Valley Water Board contemplated this argument in July 2011, August 2012, July 2013, October 2014, June 2015, and again in August 2016, and rejected it each time.

The appropriate window of time to challenge the reporting requirements in the Monitoring and Reporting Program (MRP) included with the Reissued General Order has passed. If the Discharger felt aggrieved by either the reporting requirements or the deadlines in which to submit the reporting requirements as established in the MRP, these issues should have been raised within the appropriate time period subsequent to the Reissued General Order's adoption. Pursuant to Water Code section 13320, the Discharger had 30 days following 3 October 2013 to petition the Central Valley Water Board's action in adopting the Reissued General Order. This subsequent attempt to challenge the legality of the reporting requirements in the Reissued General Order in the present enforcement proceeding is merely a collateral attack on the Order and should not be permitted.

**VII. The Discharger's Conclusions about the Impact of the Dairy General Order on Small Dairy Attrition Rates, and about the Impact of Small Dairies on Water Quality are not Based in Fact**

The Discharger's arguments regarding small dairies are not on point to the issues in the current proceeding and, furthermore, should be barred by collateral estoppel because they were raised

by the Discharger during the previous proceedings. The Discharger argues that both the San Francisco and North Coast Regional Water Quality Control Boards have made a factual finding that small dairies do not pose a threat to water quality. In its evidentiary submission, the Discharger references two Waste Discharge Requirement waiver programs enacted by other Regional Water Quality Control Boards. (See 28 February 2017 *Submission of Evidence and Policy Statements*, p.20-21, referring to R1-2012-0003 and R2-2003-0094.)

When the 2007 General Order was adopted, the Central Valley Water Board considered exempting small dairies from monitoring requirements, but eventually rejected this approach. In 2007, evidence showed that small dairies pose a threat to water quality. In comparison to the Central Valley Region, the North Coast and San Francisco Bay Regions have very different climatic, geologic, and land use conditions that justify different permitting conditions for small dairies. Those regions have fewer dairies and the spacing between individual dairies is greater. The overwhelming majority of dairy cattle in California are in the Central Valley Region, and are concentrated in areas surrounded by intensive agricultural use that presents a significant threat to groundwater quality, of which dairies are a contributor. Unlike the North Coast and San Francisco Bay Regions, the Central Valley receives comparatively little precipitation and groundwater recharge of an aquifer that it is extensively used for drinking water, industrial supply, agricultural supply, and other uses.

The Central Valley Water Board decided that it was necessary to regulate small dairies in order to identify water quality problems. Collection of information through the Reissued General Order allows the Board to determine what improvements are necessary to improve water quality. It also allows necessary improvements to be planned so they can be implemented in an effective and efficient manner that protects water quality throughout the region.

The Discharger also makes several statements arguing that the cost of complying with the 2007 General Order led to the decline in small dairies in the Central Valley. These arguments are oversimplified and rely upon a very loose interpretation of fact. Central Valley Water Board staff estimates that the cost associated with complying with the Reissued General Order Annual Reporting Requirement for 2015 is approximately \$3,047. (Attachment A of ACLC R5-2017-0504.) The Discharger references attrition data from 2007 and 2010 for small dairies in an attempt to show that the cost associated with complying with the 2007 General Order resulted in many small dairies closing down. (28 February 2017 *Submission of Evidence and Policy Statements*, p. 20.) This conclusion ignores many key facts. Like other small businesses in the economic downturn, small dairies declined for a variety of economic reasons. Much of the attrition suffered by small dairies resulted from economic conditions unrelated to adoption of the 2007 General Order, and not from the cost associated with compliance.

**VIII. The Central Valley Water Board Staff Provided the Discharger with all Necessary Information Pertaining to the Representative Groundwater Monitoring Program**

The Discharger asserts that the Central Valley Water Board has failed to demonstrate the value of or need for joining a representative groundwater monitoring program. This issue is not relevant to the subject complaint, which only alleges a violation for failure to submit the 2015 annual report. Furthermore, the issue has been previously considered by the Central Valley Water Board and should be barred by collateral estoppel.

To satisfy the monitoring requirements of the Reissued General Order, permittees may perform individual monitoring, or may join a representative groundwater monitoring program. The Central Valley Water Board does not have an obligation to convince dairies to join a representative groundwater monitoring program, but rather only to provide the information to be able to do so.

On 5 May 2012 the Executive Officer of the Central Valley Water Board issued an Order, pursuant to Water Code section 13267 Order ("13267 Order") that directed the Discharger to implement groundwater monitoring at the Dairy. Specifically, the 13267 Order directed the Discharger to submit either: 1) written notification, by 25 May 2012, that the Discharger has joined a coalition group that will develop a representative groundwater monitoring program as an alternative to implementing an individual groundwater monitoring program at the Dairy; or, 2) an acceptable groundwater monitoring well installation and sampling plan (MWISP) to the Central Valley Water Board by 29 June 2012. On 19 July 2012, Central Valley Water Board staff issued a Notice of Violation notifying the Discharger that the MWISP had not been received for the Dairy. The Notice of Violation also requested that the delinquent MWISP be submitted as soon as possible to avoid incurring any additional liability. To date, the Discharger has not joined a coalition or submitted the required MWISP. In ACLO R5-2013-0091, the Central Valley Water Board imposed administrative civil liability penalties for this violation.

In its 28 February 2017 *Submission of Evidence and Policy Statements* the Discharger states that on 27 May 2012 the Central Valley Water Board provided the relevant contact information for the representative groundwater monitoring program. The Discharger states that it contacted the program and was told that the Sweeney Dairy would be accepted. In addition, the Central Valley Water Board staff provided further information about the representative groundwater monitoring program in an email on 20 June 2013, in which the Central Valley Water Board staff advised the Discharger regarding where to obtain the locations of the proposed wells for the monitoring program.

Contrary to the assertions of the Discharger, which are in any case irrelevant to the current proceedings, the Central Valley Water Board has responded to inquiries regarding the representative groundwater monitoring program.

**IX. ACLC R5-2017-0504 is not in Excess of the Board's Jurisdiction, and does not Result in a Deprivation of the Discharger's Due Process or Civil Rights and is not an Abuse of Power**

The Discharger argues that it is a violation of due process and civil rights, and an abuse of power and process, for the Central Valley Water Board to take enforcement action against it before the *AGUA* Court has lifted the stay on the Reissued General Order, that the Central Valley Water Board staff is attempting to punish the Discharger for appealing the previous ACLOs issued against it, and that any attempt by the Central Valley Water Board to force the Discharger into a representative monitoring program violates its first amendment rights. (28 February 2017 *Submission of Evidence and Policy Statements*, pp. 25-26.)

These arguments are the same arguments raised by the Discharger during the six previous adjudicative proceedings. In all instances the Central Valley Water Board rejected the Discharger's arguments and determined that the Discharger was legally obligated to submit Annual Reports under the Reissued General Order. (See ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, ACLO R5-2014-0119, ACLO 2015-R5-0065, and ACLO R5-2016-0063.) There is no need to revisit this issue in the current proceeding.

The Discharger indicates that any application of the *Enforcement Policy* which increases the administrative civil liability penalty is a violation of due process because the adjudications of these prior violations are not yet final and inhibits the Discharger's right to appeal. The Discharger also states that it is improper to enhance "the monetary penalty on the basis of prior violations, not one of which has reached a final adjudication." (28 February 2017 *Submission of Evidence and Policy Statements*, p. 25.) The Discharger implies in these arguments that the Prosecution Team's proposed penalty is based solely on the Discharger's history of violations, and implies that the previous proceedings did not result in final orders adopted by the Central Valley Water Board.

The proposed penalty amount of \$75,600 is based on the *Enforcement Policy* methodology, which provides, in part, that the administrative civil liability amount should be increased where the Discharger has engaged in intentional or negligent behavior, where the Discharger has not voluntarily cooperated in returning to compliance, and where there is a history of repeat violations. (*Enforcement Policy*, p. 17.) In addition to the other considerations delineated in the *Enforcement Policy*, the Prosecution Team's assessment properly accounts for the Discharger's history of repeated prior violations, which were formally adjudicated and resulted in final orders adopted by the Central Valley Water Board. (See *Prosecution Team Exhibits 1-6*, ACLO R5-2011-0068, ACLO R5-2012-0070, ACLO R5-2013-0091, ACLO R5-2014-0119, ACLO R5-2015-0065, and ACLO R5-2016-0063.)

The Discharger argues that the Prosecution Team, in reaching the adjusted total liability amount, is penalizing the Discharger for exercising its right to petition the previous orders. The fact that the Discharger's petition is pending before the Fresno County Superior Court is not relevant to the Prosecution Team's application of the *Enforcement Policy* methodology. In fact, the application of the *Enforcement Policy* methodology in this case is very similar to that in other cases brought before the Central Valley Water Board.<sup>3</sup>

The Discharger argues that to any extent that the Central Valley Water Board attempts to force it to join a representative monitoring program is a violation of the Discharger's first amendment rights not to be subjected to forced or compelled speech. (28 February 2017 Submission of Evidence and Policy Statements, p. 26.) As discussed previously, the Central Valley Water Board has no obligation to convince the Discharger to join a representative monitoring program. Compliance with the groundwater monitoring requirement of the Reissued General Order may

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<sup>3</sup> See California Regional Water Quality Control Board, Central Valley Region Administrative Civil Liability Order R5-2015-0037 (In the Matter of Carlos and Bernadette Estacio, San Isidro Jersey Dairy), Attachment A, "Specific Factors Considered for Administrative Civil Liability."



be achieved either individually or through joining a representative monitoring program. The Central Valley Water Board is not attempting to force the Discharger to join a representative monitoring, but rather to comply with the monitoring requirement under the Reissued General Order in one of the two manners available to the Discharger.

**X. No conflict of interest exists between the Prosecution Team and Advisory Team**

The Discharger incorrectly asserts that the attorneys for Prosecution and Advisory Teams have a conflict of interest, as both are employed by the State Water Resources Control Board. The Hearing Procedures clearly state:

To ensure a fair hearing, the Board staff and attorneys that have issued the ACL Complaint (the "Prosecution Team") have been separated from the Board staff and attorneys that will provide legal and technical advice to the Board (the "Advisory Team"). Members of the Board's Prosecution Team have not communicated with the members of the Central Valley Water Board or the Board's Advisory Team regarding any substantive matter at issue in the proceeding. *Hearing Procedures*, p. 1.

Moreover the Hearing Procedures provide further assurance of fairness and impartiality by forbidding designated parties and interested persons from engaging in ex parte communications regarding this matter. (*Id.*).<sup>4</sup> Finally, this issue was raised by the Discharger in the previous proceedings and should be barred by collateral estoppel.

**IX. Conclusion**

The Discharger has submitted legal arguments in this proceeding that are nearly identical to the arguments presented to the Board during the proceedings for ACLC R5-2011-0562, ACLC R5-

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<sup>4</sup> In any event, assuming, arguendo, that the Prosecution and Advisory Teams' attorneys have collaborated on unrelated matters, the Supreme Court has held that there is no conflict of interest in those circumstances. (*See Morongo Band of Mission Indians v. State Water Resources Control Board*, 45 Cal.4th 731 (2009), [no conflict of interest where attorney prosecuting matter before State Water Resources Control Board simultaneously serves as advisor to Board in unrelated matter].)

2012-0542, ACLC R5-2013-0539, ACLC R5-2014-0543, ACLC R5-2015-0506, and ACLC R5-2016-0531. The only new arguments raised are objections to three of the Prosecution Team's exhibits included with the Prosecution Team's evidence submission. The objections are without merit and should be overruled. All other arguments put forth by the Discharger have been raised at previous hearings before the Central Valley Regional Board and have been previously rejected by the Board.

The Discharger has not succeeded in challenging the Reissued General Order's requirement to submit Annual Reports, and arguments against the propriety of that requirement should be rejected on jurisdictional grounds in this proceeding. Any evidence submitted by the Discharger in support of these arguments should be excluded from the record on the basis of relevance and on the basis of collateral estoppel. The only issue relevant to this administrative civil liability proceeding is whether the Discharger submitted the 2015 Annual Report by 1 July 2016 as required by the Reissued General Order and the MRP, as amended. The Prosecution Team contends that it is clear that the report was not submitted by the required deadline and recommends to the Central Valley Water Board the imposition of an administrative civil liability penalty of \$75,600 as proposed.

Dated: 8 March 2017

Respectfully submitted,

CALIFORNIA REGIONAL WATER QUALITY  
CONTROL BOARD, CENTRAL VALLEY  
REGION PROSECUTION TEAM

By:

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Susie Loscutoff